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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Policies and Rules )  
Concerning Toll Fraud )

CC Docket No. 93-292

**REPLY COMMENTS OF  
AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

The Ad Hoc Telecommunications Users Committee (Ad Hoc Committee) hereby submits its reply comments in response to the Notice of Proposed Rulemaking (NPRM), released in the above-captioned docket on December 2, 1993.

**I. INTRODUCTION**

Initial comments in this proceeding bear out the Commission's assessment that toll fraud has become a major problem. Many users testify firsthand to the vulnerability of both CPE and network services generally to fraudulent misuse. And most commenters agree, at least as an abstract matter, that an equitable allocation of the losses due to such fraud is appropriate, based on the underlying principle that liability for toll fraud should be allocated among the parties by reference to who can most readily and economically take steps to detect and prevent the fraud.

But commenters disagree on where the equities lie. Most of the carriers would prefer to wash their hands of fraud, claiming that in virtually all cases, it is someone else's fault and should be someone else's responsibility to take steps to prevent fraud and to swallow any resulting

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losses. An analysis of the facts, however, demonstrates that this is not so. Carriers have a very important role to play in detecting and preventing fraud. If they fail to carry out this function, they should bear the losses resulting from their failure. Such a result would not only be equitable, it would give the carriers a strong incentive to do what only they can do -- network monitoring and reporting -- to clamp down on fraud.

**II. THE INITIAL COMMENTS HEREIN DEMONSTRATE THAT DECISIVE COMMISSION ACTION IS NEEDED TO EQUITABLY APPORTION THE LOSSES RESULTING FROM TOLL FRAUD.**

**A. The Comments Demonstrate That Carriers Should Bear A Fair Share Of The Losses Resulting From CPE-Based Fraud.**

In its initial comments herein, the Ad Hoc Committee made two points. First, any losses resulting from perpetrators' manipulation of the network that are not attributable to customer equipment should fall in the ordinary course on the carrier, not the customer. Second, while it is appropriate for the Commission to require carriers and CPE vendors to warn their customers of the hazards of toll fraud, the Commission should be careful to frame the warning requirement in a way that does not inadvertently (through "implied preemption") deprive customers of their right to pursue remedies against carriers and vendors for their losses under such causes of action as negligence, fraud, intentional or negligent misrepresentation, breach of contract or breach of warranty.

An outpouring of user comments are fully consistent with the Ad Hoc Committee's initial comments. Indeed, they go further. Many users have pointed out convincingly that, even in the case of PBX fraud, the carriers can and should do their part to help prevent it; the problem is not merely the domain, as the carriers would have it, of the customers and the CPE vendors, manufacturers and maintenance entities. This is because the carriers can and in most cases do monitor traffic on their networks for unusual patterns of activity, which are characteristic of toll fraud. At least one pair of customers -- Leucadia National Corporation (Leucadia) and American Investment Bank (AIB) recounts an instance in which:

their carrier was in fact aware of a thousand-fold increase in activity on certain Leucadia and AIB lines with calls being placed to Pakistan and the Dominican Republic, locations to which carriers are aware a large number of fraudulent calls are placed. Unfortunately, their carrier claims it was not obligated to nor did it actually inform them of this unusual increase in activity which, it was learned, was fraudulent.

Leucadia and AIB Comments at 3.

Under a scheme in which the carrier is absolved from liability for PBX-related fraud, the picture painted by Leucadia and AIB is unfortunately all too plausible. Carriers in such circumstances should have an affirmative duty to monitor traffic for signs of fraud and to warn an affected customer immediately if such signs are detected, so that the customer can take steps to deal with the situation.

A carrier who fails to carry out this duty should bear the loss associated with any fraud that could have been prevented by timely notification to the customer.

The need for the Commission to require carriers to take a more active role in preventing fraud is borne out by the comments of many other users, all of whom recognize that, when interlopers find their way through a PBX, the carriers' network monitoring represents the last-ditch defense against fraud. See, e.g., Comments of American Petroleum Institute (API) at 5-6, 12-14; International Communications Association at 10; Tele-Communications Association (TCA) at 5; Planned Parenthood of New York City and Reynolds and Reynolds (Planned Parenthood) at 5, 7 n.7; Aeronautical Radio, Inc. (Arinc) at 2-4; and several dozen letters from small and medium sized business users; see also Telecommunications Resellers Association (TRA) Comments at 6-7.

Nor should it be concluded that the comments of these users represent an attempt (as do the comments of many carriers) to pass the buck. All users recognize their responsibility to take steps to safeguard their own CPE to prevent fraud. See, e.g., Arinc at 3; ICA at 9-10; TCA at 7-8; Planned Parenthood at 6. But users refuse to accept the proposition that they alone are responsible. Instead, they propose constructive approaches for equitable sharing of risks.

Arinc, for example, notes that many users have taken all the steps they understood they needed to take to secure their equipment against toll fraud, but toll fraud has nevertheless victimized them. See Comments of Arinc, attached "Reply Comments of Aeronautical Radio, Inc." at 4-5. Arinc accordingly urges the Commission to adopt a rule providing that customers who (i) take all security measures specified by the CPE manufacturer; (ii) control the distribution and use of authorization codes; (iii) notify the carrier promptly after learning of any toll fraud; and (iv) cooperate with carriers' and law enforcement agencies' investigations, should be absolved of toll fraud liability. Only if the carrier notifies the customer that toll fraud appears to be occurring and the customer then fails to take reasonable steps to deal with the problem should the customer be liable under Arinc's proposal. Arinc at 2-4.

API takes a somewhat different approach from Arinc. It proposes a phased model for assessing liability in an instance in which CPE security is breached. First, users would be responsible for fraud until such time as carriers should reasonably have detected it.<sup>1/</sup> This period (Phase I) would terminate upon the earlier of: (i) four hours after the initial breach or (ii) the incurrence

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<sup>1/</sup> Of course, if the fraud could be directly traced to the negligence of some other party, such as the CPE vendor or maintenance organization, or in some cases the carrier itself, that party, not the user would be liable for this initial period of fraud. API at 7.

of \$500 worth of unauthorized calls. If the carrier does not notify the customer of the usage patterns suggesting fraud before the expiration of Phase I, then Phase II would begin, and the carrier would assume 50 percent of losses resulting from fraud occurring during Phase II, with remaining losses allocated among other negligent parties. Phase II would end only when the carrier notifies the user of the ongoing fraud. Liability for fraud occurring after that time would revert to the user or other negligent parties, unless the carrier fails to take action reasonably requested by the user to end the fraud. API at 6-12.

Of these two approaches, Arinc's is preferable on balance because it maximizes the incentive on carriers to deal with fraud while continuing to hold users responsible where their own negligence permits the fraud. API's approach is more lenient with the carriers than need be, though it provides a useful framework for understanding when and how the several parties have the best ability to detect and prevent fraud. Certainly, API's approach represents the minimum acceptable level of carrier liability. Either way, it is imperative that the Commission adopt one of these approaches, or some reasonable facsimile thereof, to avoid allowing carriers to shirk their duties entirely.

Carrier complaints that they should have no liability for CPE fraud are feeble in the face of the balanced approaches proposed by customers. AT&T (at 10-12), MCI (at

6-7),<sup>2/</sup> the Competitive Telecommunications Association (CompTel) (at 2-5), Pacific Bell and Nevada Bell (at 11-13), and many others assert that because the customer has control over what CPE to buy and what CPE-based security measures to deploy, the carriers can duck the problem altogether.<sup>3/</sup> But this attitude evades the central point: that all parties have a role to play in detecting and preventing fraud and that each should bear the consequences of failure to perform its role. Indeed, the carriers' position is particularly maddening because, as several users point out, carriers actually profit from toll fraud to the extent they can foist liability off on others. The Commission should dismiss their self-serving arguments.<sup>4/</sup>

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<sup>2/</sup> AT&T (at 17 n.20) and MCI (at 1-2) at least acknowledge explicitly that network-based fraud should be the carrier's responsibility, as the Ad Hoc Committee pointed out in our initial comments.

<sup>3/</sup> CompTel (at 5) does not even believe that carriers should be required to warn customers about the risk of toll fraud. This "see-no-evil" approach is unhelpful, to put it mildly.

<sup>4/</sup> MCI and AT&T point out that they can only "see" calls coming over their own networks and therefore, by warning a customer and (upon request) blocking calls from that customer's PBX, cannot detect or prevent fraud taking place over other carriers' networks. MCI at 7-8; AT&T at 11. This argument is both tautological and a red herring: as long as a carrier carries out its duty to monitor and warn as to its own network, and is guilty of no other negligence or malfeasance, no one is arguing that it should be liable for fraud that does not traverse its network.

**B. Additional Measures Proposed By Users Should Also Be Adopted To Deal With CPE-Based Fraud.**

User comments also suggest a number of other measures the Commission should take in combatting fraud.

Among these are:

- Requiring carriers to modify their tariffs so that they charge only their costs, and do not collect a profit, on fraudulent calls (API at 11-12; TCA at 9-10);
- Requiring carriers to offer international call blocking on all business lines (TCA at 3-4; ICA at 12-13);
- Requiring carriers to require the use of the "1+" prefix on all toll calls (TCA at 4-5);<sup>5/</sup>
- Convening a federal Advisory Committee to study the problem and propose further solutions (ICA at 4-5; Planned Parenthood at 10); and
- Proposing legislation to Congress to clarify the criminal liability of perpetrators of toll fraud (API at 19-20; ICA at 5-6; Planned Parenthood at 11).<sup>6/</sup>

The Ad Hoc Committee believes that all of these ideas have merit, and supports their adoption by the Commission. The Ad Hoc Committee also agrees with the great majority of

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<sup>5/</sup> For more than a year, the Ad Hoc Committee, together with several other users, has been urging the Commission to take this very step to avoid needless CPE reprogramming costs. See Initial Comments of Ad Hoc Committee, CC Docket No. 92-237, filed December 28, 1992, at 18-27, 37-38; Ex Parte Letter of James S. Blaszk, Esquire, to Donna R. Searcy, CC Docket No. 92-237, May 6, 1993. The usefulness of this measure in preventing toll fraud is an additional important reason for the Commission to act on this issue. And, as the Ad Hoc Committee's submissions in CC Docket No. 92-237 make plain, the need for speedy action is urgent.

<sup>6/</sup> The Ad Hoc Committee takes no position as to the merits of any particular proposal for such legislation.



commenters of all types that increased education of the public on the dangers of toll fraud and how to prevent it would be useful.

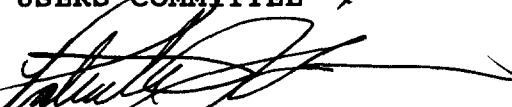
### III. CONCLUSION

The Commission should assure that the liability for toll fraud is apportioned equitably, as the user comments set out, and that neither carriers nor any other party be able to avoid their fair share. It should also take the other actions described above to combat the continuing problem of toll fraud.

Respectfully submitted,

**AD HQC TELECOMMUNICATIONS  
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